EXCERPTS FROM APPELLANT'S REPLY BRIEF BEFORE THE NEW YORK COURT OF APPEALS (pp. 4-6, 9)

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[4]

POINT II

The defendants' briefs avoid the real issues in this appeal — if the plaintiff's "injury" is a disease when does it "occur" for statute of limitations purposes, and did *Schmidt* v. *Merchants' Despatch Transp. Co.* misapply the common law principles of accrual for negligence actions. Their briefs lack an independent, substantive analysis of these issues.

The governing rules for statutes of repose existed long before *Schmidt* was determined. Appellant's brief seriously questions whether *Schmidt* is consistent with those rules. *See* Appellant's Brief, pp. 15-19. The defendants give no adequate reply, but only point to what is at issue - - *Schmidt.*

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Like the shell man at the carnival, their aim is to direct the viewer's eye toward the empty shell — rejection of a "discovery rule." The brief filed by Johns-Manville Corporation, in particular, seeks escape from the principal task required of this court which is not the adoption of a discovery rule, but the reexamination of *Schmidt* v. *Merchants Despatch Transportation Co.;* whether it is, indeed, consistent with traditional common law rules of accrual for negligence actions and whether its factual assumptions have a basis in reality. Appellant's brief makes this quite clear at the outset. *See* Appellant's Brief at p. 5-6.

Consequently, plaintiff's action is not governed by any discovery statute of limitations [*e.g.*, CPLR 203(f)], but by

Excerpts from Appellant's Reply Brief before the New York Court of Appeals

CPLR 214(5). Neither the Appellate Division, nor Special Term, nor the other defendants thought it proper to measure the timeliness of this action by any period of limitations other than CPLR 214(5). There is no question but that this action is timely brought under Section 214(5).

Johns-Manville seeks victory, then, not by responding to appellant's analysis of *Schmidt*, but in an exercise of litigious sophistry undertakes the destruction of a self-raised, "straw man" argument against an all-embracing discovery rule for products liability litigation. Where is its response, however, to appellant's claim that *Schmidt* applies the wrong accrual rule for negligence actions in effect using the time of the wrongful act and not the date of injury? Where is its answer that *Schmidt's* precedential cornerstone (*Conklin* v. *Draper*) has been overruled? Where is its attempt to explain the erosion of *Schmidt's* precedential support outside this state? *See* Appellant's Brief at p. 16-17; indeed, after appellant filed her brief the intermediate appellate court's decision was upheld in *Nolan* v. *Johns-Manville*, 74 Ill. App.3d 778, 392 N.E.2d 1352, *aff'd.* 49 Law Week 2568 (2/21/81) (Ill.Sup.Ct.). The Supreme Court of Virginia has also examined and redefined its application to asbestos diseases of the date of injury concept, as appellant herein urges, without resort to an expansive discovery rule. *See*

Locke v. *Johns-Manville Corp.*, 275 S.E.2d 900 (Va.Sup.Ct. 1981). Johns-Manville Corporation simply remains silent when appellant claims that *Schmidt* did not correctly apply the date of injury rule. Revealingly, it choses to argue about something else.

The defendants argue, in an inconsistent fashion, that the citation of cases from other jurisdictions is not persuasive

(Defendants' Brief pp. 13-14); yet judicial decisions from other jurisdictions was a cornerstone of *Schmidt* (270 N.Y. at 302). If developing case law was once a legitimate consideration in *Schmidt's* development, it is an equally persuasive consideration in its demise.

They fail to explain, understandably enough, *how Schmidt* can provide any litigant with an adequate, *bona fide* opportunity to sue and do not distinguish the *reasoning* of the United States Supreme Court in *Urie* v. *Thompson*, 337 U.S. 163, 69 S.Ct. 1018, which embraced the statute of limitations rule advanced by this plaintiff (*See* Appellant's Brief pp. 37-39). The defendants do not explain *why* the *Schmidt* holding escapes the high Court's condemnation as "delusive" and inconsistent "with the traditional purposes of Statutes of Limitation . . . ." *Id.*, at 170, 69 S.Ct. at 1025.

In reply to appellant's due process attack on *Schmidt*, Johns-Manville again plays the shell man's game. It portrays her as an advocate of an issue which in fact she does not advance (establishment of an independent, constitutional right of access to the courts which is being denied her in violation of the equal protection clause). *See* Johns-Manville's Brief at p. 11-12. Appellant's due process claim is thus deftly removed from the proper precedential context* and placed in the two-tier, equal protection framework of *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

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*See Appellant's Brief at p.31-32 discussing *Jackson* v. *Lamphire, et al* and *Gilbert* v. *Ackerman, et al.*

Excerpts from Appellant's Reply Brief before the New York Court of Appeals

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Johns-Manville expresses concern about the "cost" of products liability insurance premiums, but nowhere mentions the cost in human life, the pain and suffering, or the financial losses which these out of state defendants have cast upon the citizens of New York and the fisc of our statutory benefit programs which can never be reimbursed from third party recoveries if the Johns-Manville Corporation has its way. Johns-Manville and its fellow defendants would dearly love to go their way undisturbed and leave to the good people of this state, and their employers, the costly chore of cleaning up the refuse of destroyed and impaired human lives which they foresaw, yet nevertheless produced, so that they might do business in New York State. Thus far that bill has been paid only by New York employers and employees.

The defendants' position is very simple — blind adherence to a judicial aberration that was wrongly decided forty-five years ago and still is unable to justify its holding to the very principles it professed to espouse; nor can it dissuade contemporary judicial opinion being developed by our sister states. These defendants boldly refuse recognition to the legitimate limitations of *stare decisis* and urge retention of a *judicial* rule that cannot justify itself to reason. *But see* Appellant's Brief at pp. 46-49.

Having read the defendants' arguments, plaintiff's position remains unchanged. We are convinced that *Schmidt* was wrong when it was first decided. Time has not altered its character. It is an outright denial of due process for the law to charge people with knowing what is inherently unknowable. *See* 63 *Harv.L.Rev.* at 1200, 1203-1207.

The defendants refuse to be drawn into this debate preferring, instead, to reargue the merits of a discovery rule. That, however, is not the issue. We do not call for a discovery rule as did the plaintiff in *Thornton*, but for the application of traditional statute of limitations rules even if the resulting injury